

Le financement de l'innovation

Rapport fondateurs-investisseurs

7^{ème} journée des start-up, des
PME et de l'innovation



Steuerabzüge und Konjunkturspritzen

Das Fehlen von Eigenmitteln ist insbesondere für viele kleine Unternehmen eine wesentliche Hürde bei Innovationsaktivitäten. Hier wirken sich vor allem Kapitalmarkt-Unvollkommenheiten (asymmetrische Information) sowie Unteilbarkeiten bei Innovationsprojekten negativ aus. Infolge der jüngsten Finanz- und Wirtschaftskrise haben die Eigenmittel – die wichtigste Quelle der Innovationsfinanzierung – bei vielen kleineren Unternehmen abgenommen. Angesichts der verhaltenen Wachstumsperspektiven wird dieser Mangel an Eigenmitteln vermutlich längere Zeit anhalten. Unter diesen Umständen könnte sich das konjunkturelle zu einem strukturellen Hemmnis wandeln, insbesondere wenn mangelnde F&E-Investitionen zu einem Verlust von Know-how führen. Dieses in konjunkturell besseren Zeiten wieder aufzubauen, ist oftmals schwierig und kostspielig.

Spyros Arvanitis, Florian Seliger, Andrin Spescha, Tobias Stucki, Martin Wört, Der Innovations-Champion Schweiz schwächelt, in: Die Volkswirtschaft, 21.12.2015

TABLE DES MATIÈRES (1)

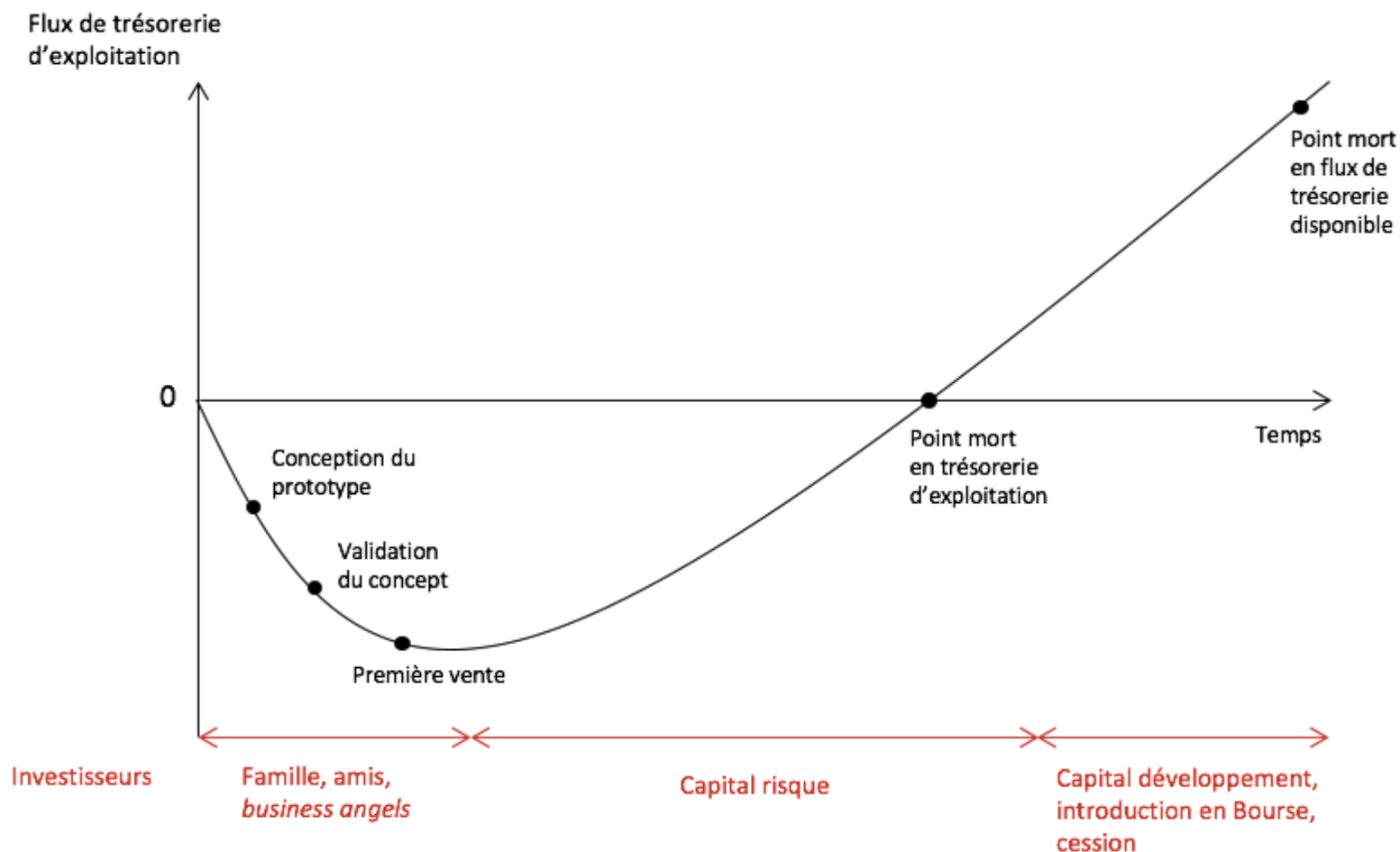
1. Partie introductive

2. Quelques moyens de financement dans le détail

1. L'entrée au capital-actions de fonds de Private Equity
2. Le prêt mezzanine convertible ou à option

3. Conclusion

1.1 ETAPES DU FINANCEMENT D'UNE CRÉATION D'ENTREPRISE RÉUSSIE



Source adaptée: Pierre Vernimmen, Finance d'entreprise, 13^{ème} édition, Pascal Quiry/Yann Le Fur, Dalloz, Paris 2015, p. 908 § 44.11

1.2 LES SOURCES DE FINANCEMENT

Fonds étrangers

- *Contrat de prêt*
- Emission d'obligations
- *Leasing, factoring, acomptes de clients, crédits de fournisseurs*



Catégorie hybride

- Prêts mezzanine (avec subordination)
- Emission d'obligations convertibles et augmentation conditionnelle du capital-actions



Fonds propres

- Augmentation ordinaire du capital-actions
- Augmentation autorisée du capital-actions
- IPO

1.3. LES ACTEURS DU FINANCEMENT

Fonds étrangers

Contrat de prêt

Obligations

Banques,
actionnaires,
particuliers

Catégorie hybride

Prêts mezzanine

Obligations
convertibles

Banques,
investisseurs

Fonds propres

Augmentation
ordinaire et autorisée
du capital-actions,
IPO

Actionnaires
existants,
investisseurs, seed
capital, business
angels, private equity

TABLE DES MATIÈRES (2)

1. Partie introductive

2. Quelques moyens de financement dans le détail

1. L'entrée au capital actions de fonds de Private Equity

2. Le prêt mezzanine convertible ou à option

3. Conclusion

2.1. AUGMENTATION DU CAPITAL-ACTIONS / PRIVATE EQUITY (1)

Fonds étrangers

Contrat de prêt

Obligations

Banques,
actionnaires,
particuliers

Catégorie hybride

Prêts mezzanine

Obligations
convertibles

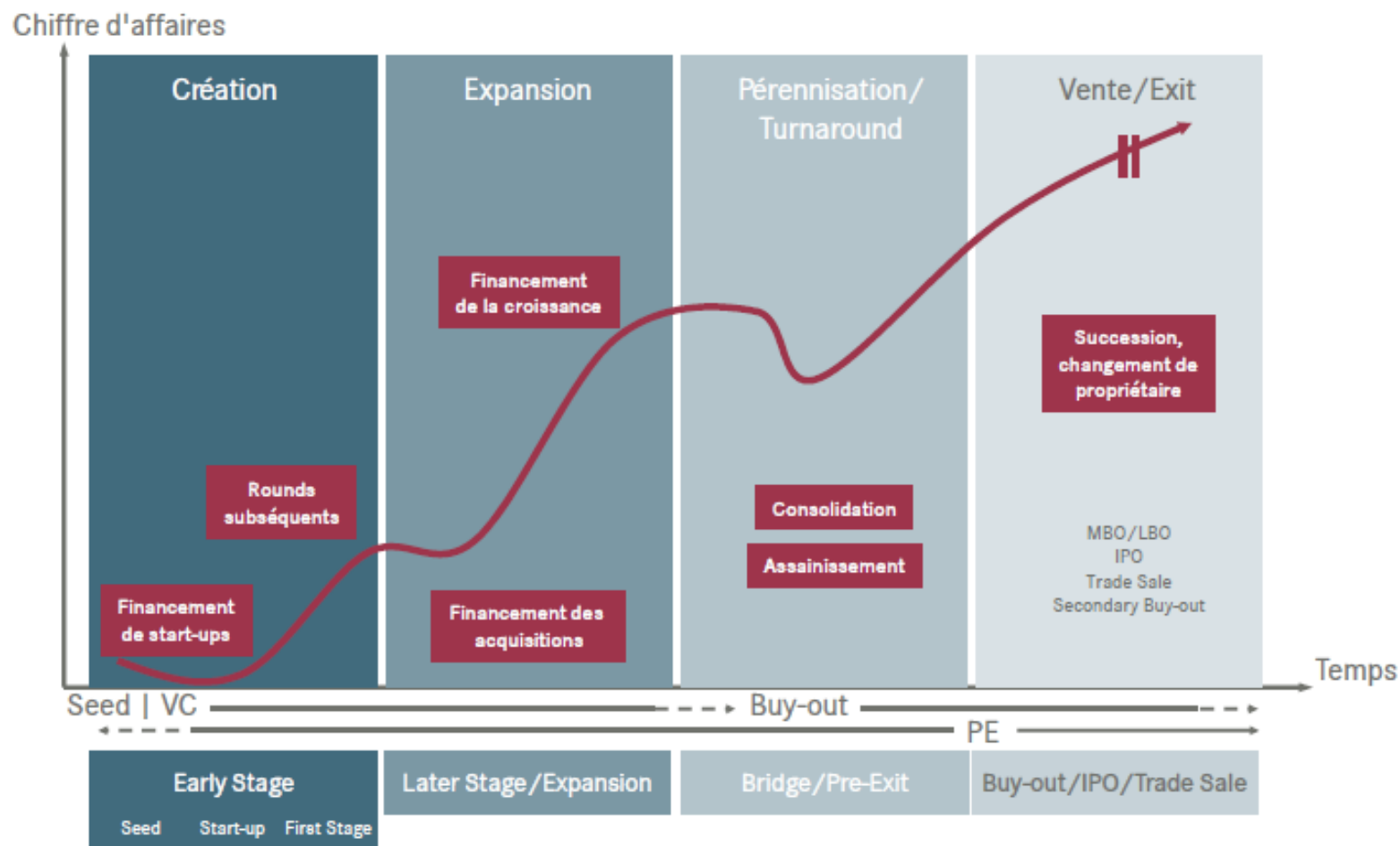
Banques,
investisseurs

Fonds propres

Augmentation
ordinaire et autorisée
du capital-actions,
IPO

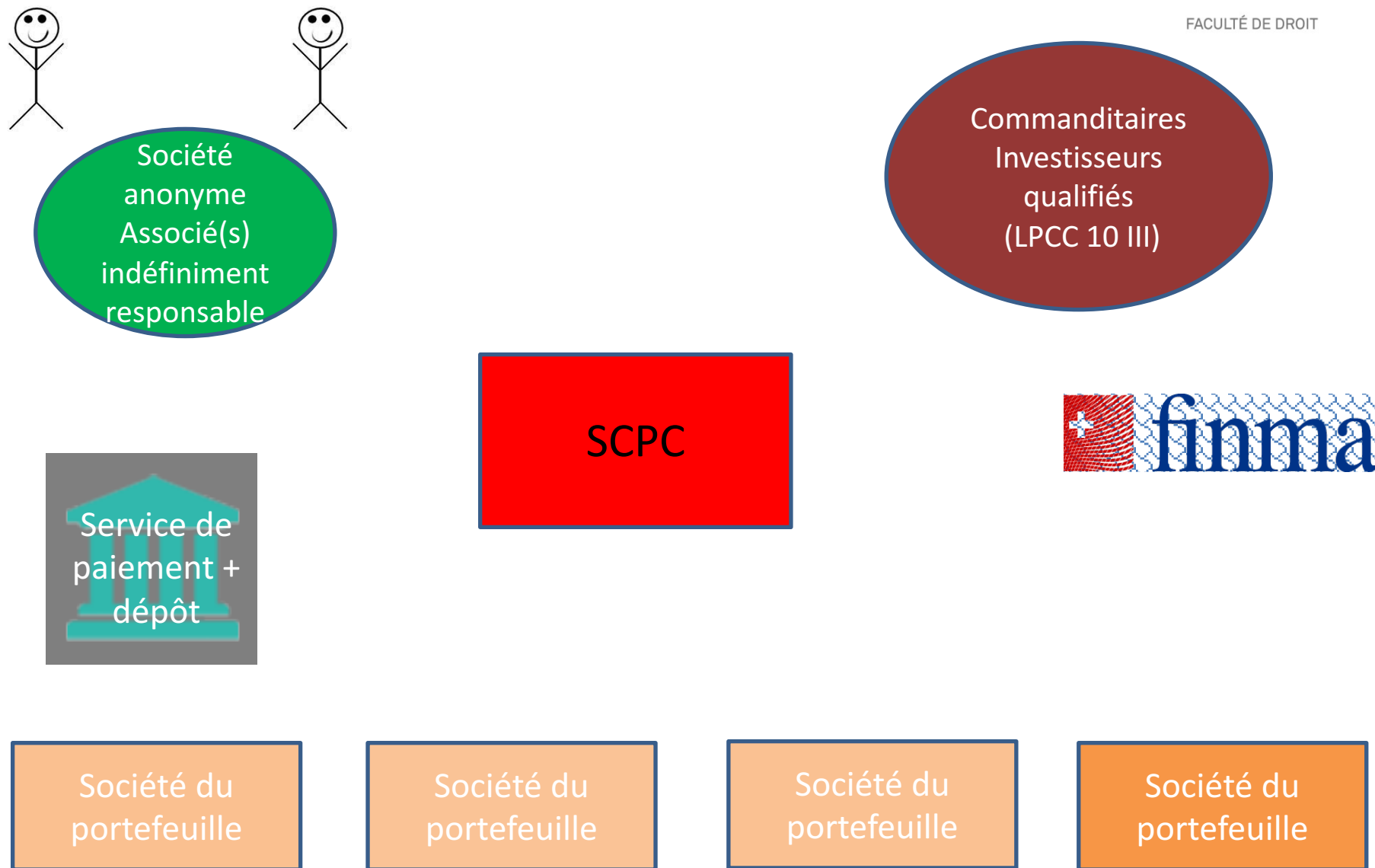
Actionnaires
existants,
investisseurs, seed
capital, business
angels, private equity

2.1. PE: OBJET DU FINANCEMENT F(X) CYCLE DE VIE (2)

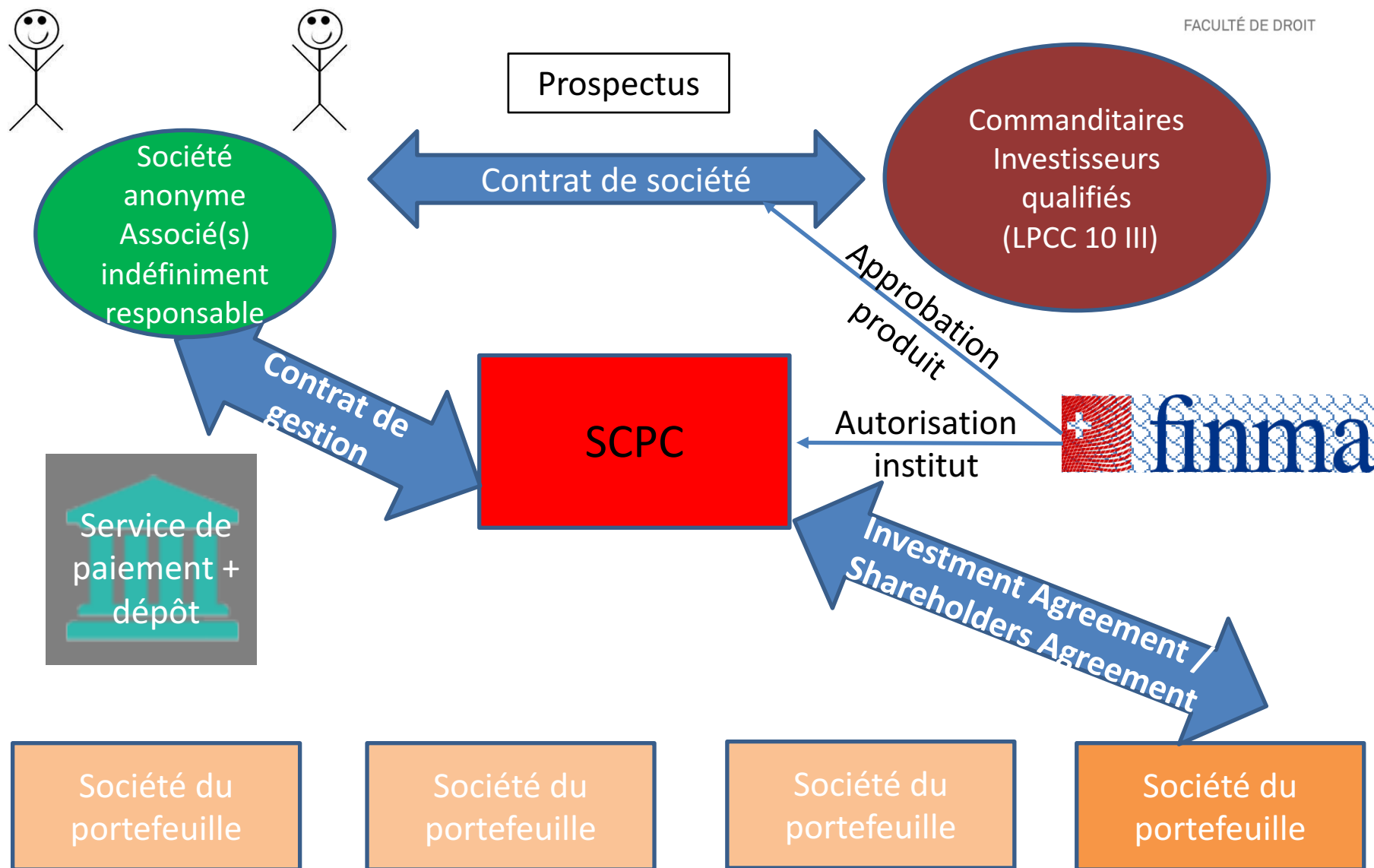


Source: Gerhard Frank, 2012

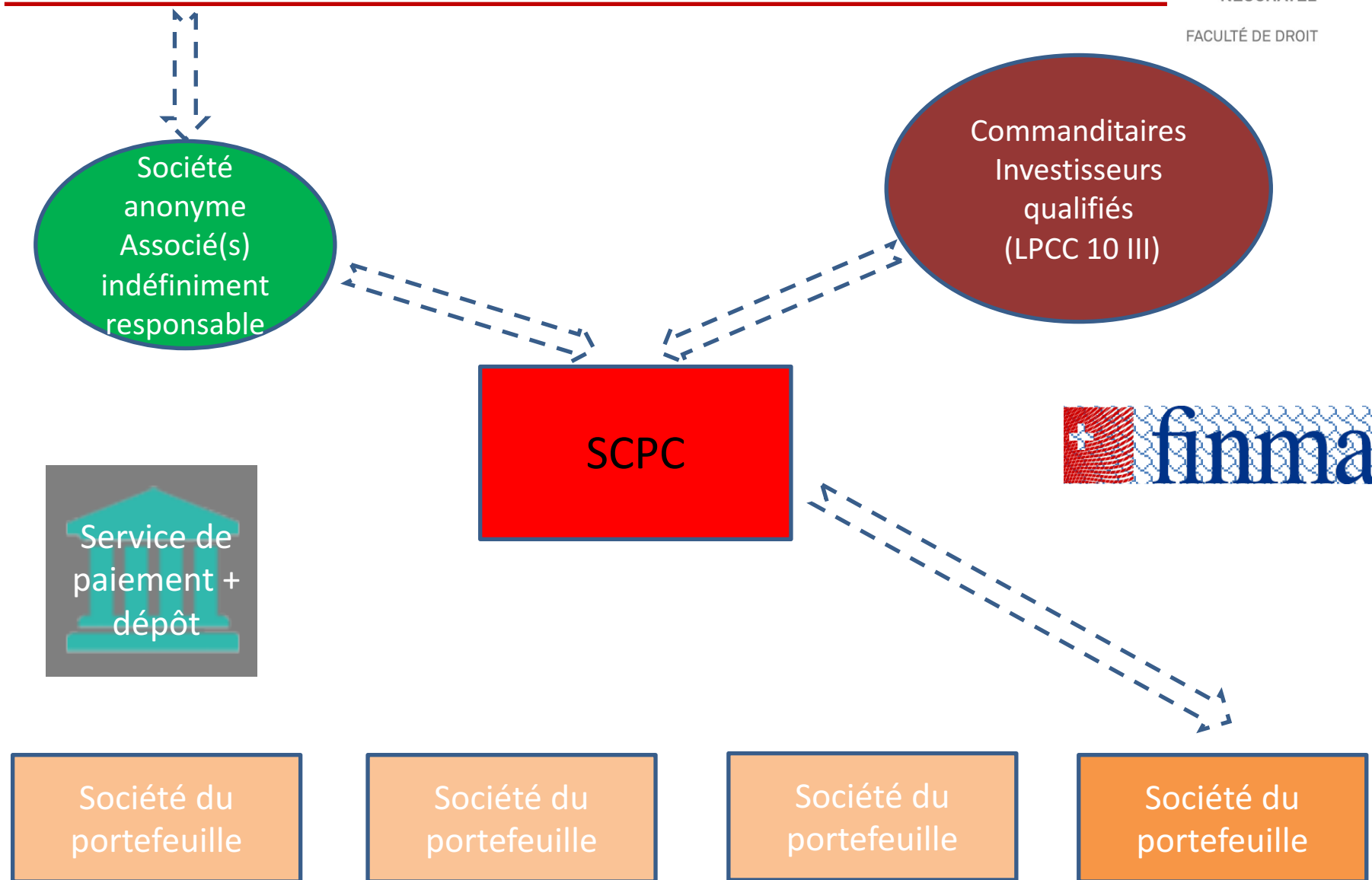
2.1. ENTRÉE AU CAPITAL D'INVESTISSEURS « PRIVATE EQUITY » - STRUCTURE (3)



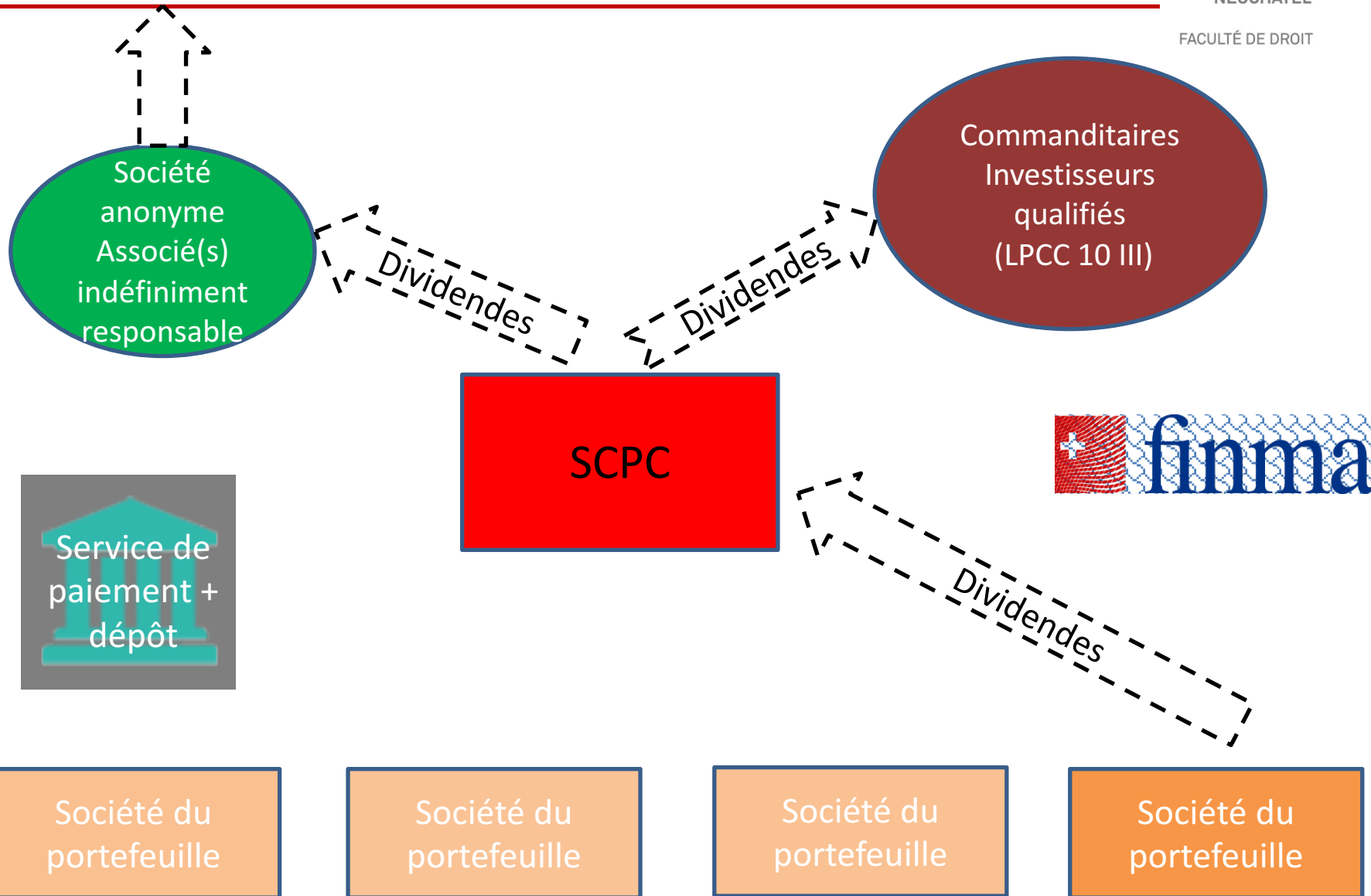
2.1. ENTRÉE AU CAPITAL – RAPPORTS CONTRACTUELS – AUTORISATIONS (4)



2.1. ENTRÉE AU CAPITAL – INVESTISSEMENTS (5)



2.1. ENTRÉE AU CAPITAL – RETOUR SUR INVESTISSEMENTS (6)



2.1. ENTRÉE AU CAPITAL D'INVESTISSEURS « PRIVATE EQUITY » (7)

- **Comment ? augmentation du capital-actions**
 - Processus:
 - Convocation d'une assemblée générale extraordinaire
 - Augmentation ordinaire / autorisée
 - Décision de l'assemblée générale
 - Droit de souscription préférentiel
 - Majorité qualifiée (augmentation autorisée seul.)
 - Souscription
 - Modification des statuts
 - Exécution

2.1. ENTRÉE AU CAPITAL D'INVESTISSEURS « PRIVATE EQUITY » (8)

- **Comment ? augmentation du capital-actions**
 - **Documentation relative à l'augmentation du capital-actions**
 - Termsheet
 - Investment and Subscription Agreement
 - Statuts modifiés

2.1. ENTRÉE AU CAPITAL D'INVESTISSEURS « PRIVATE EQUITY » (9)

- **Comment ? augmentation du capital-actions**
 - **Rapport entre fondateurs et investisseurs PE : convention d'actionnaires et règlement d'organisation du CA**
 - **Clauses typiques :**
 - [Modalités d'information](#)
 - [Clause électorale](#)
 - **Privilèges patrimoniaux:**
 - Souscription à des conditions préférentielles
 - Actions privilégiées
 - Mécanismes de protection contre une dilution
 - Cession gratuite
 - Règles de majorité pour les décisions importantes
 - Exit (interdiction de cession, [right of first refusal](#), [tag-along](#), [drag-along](#), [option right](#))
 - Résolution de conflits
 - [Concordance entre statuts et convention](#)

TABLE DES MATIÈRES (2)

1. Partie introductive

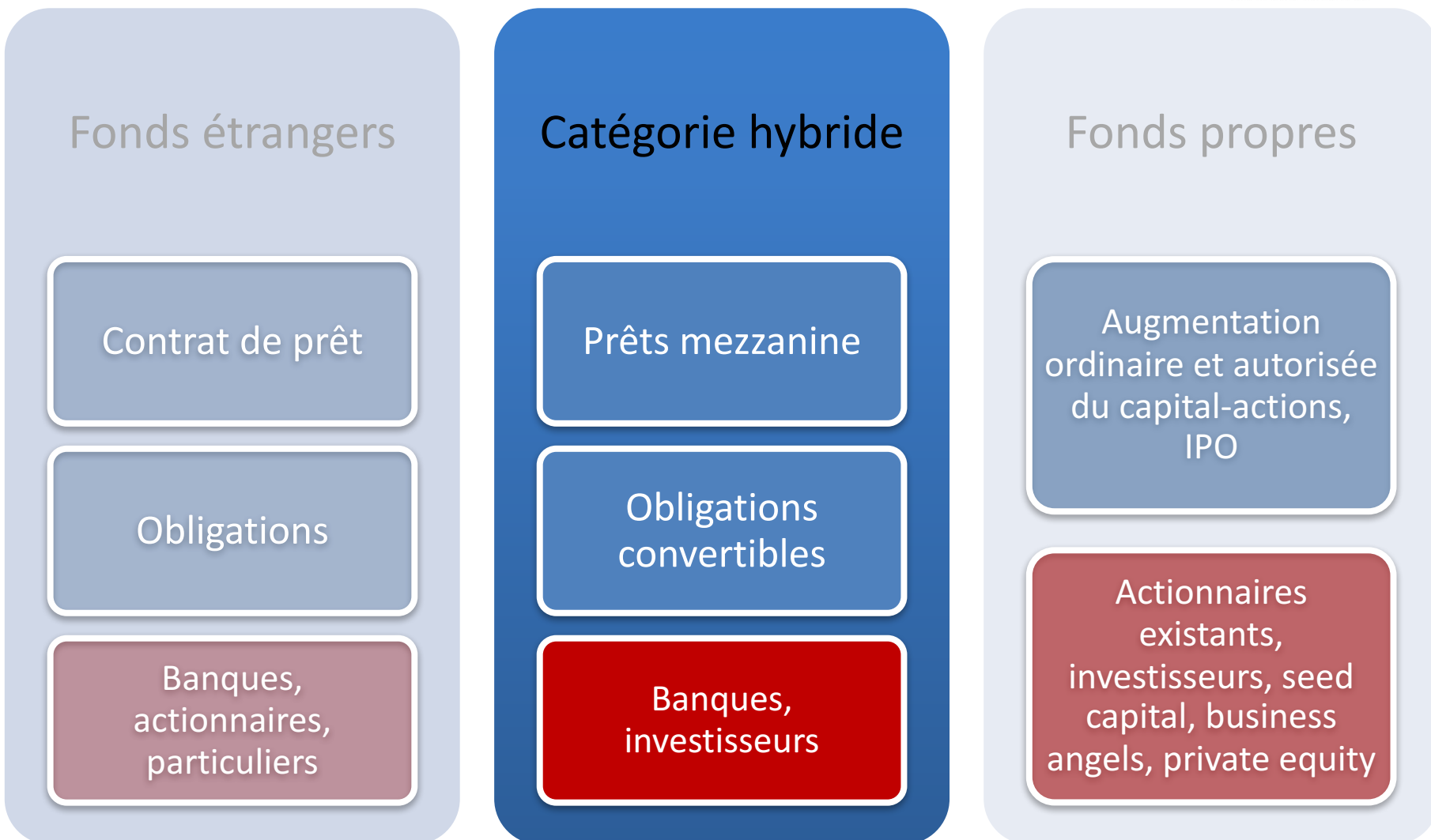
2. Quelques moyens de financement dans le détail

1. L'entrée au capital actions de fonds de Private Equity

2. Le prêt mezzanine convertible ou à option

3. Conclusion

2.2. LES DIFFÉRENTS ACTEURS DU FINANCEMENT



2.2. PRÊT MEZZANINE (1)

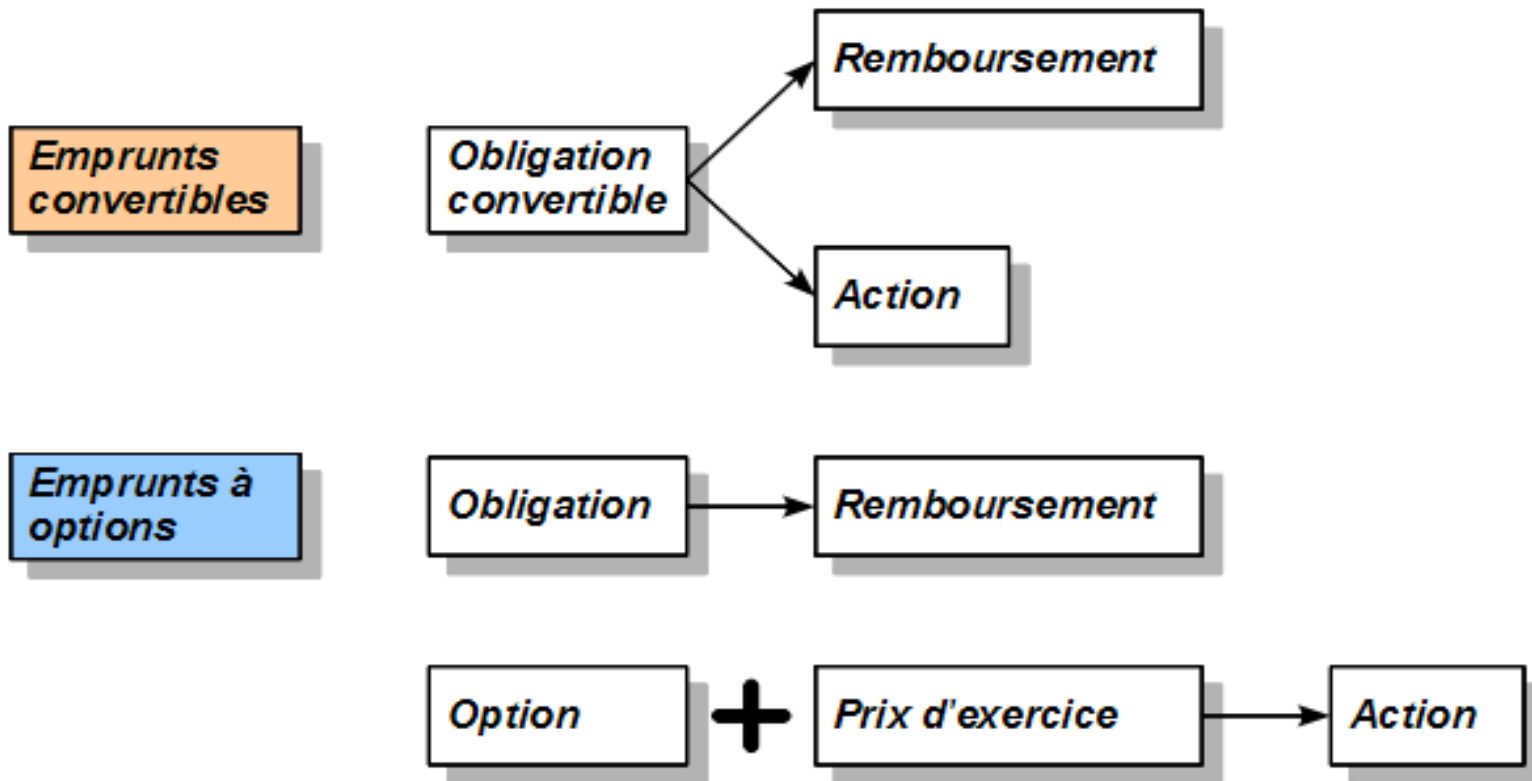
- Contrat de prêt (et/ou « Intercreditor Agreement »)
- De longue durée (5-8 ans)
- Subordonné vs « dette senior bancaire »
 - CO 725
 - Juridiquement: fonds étrangers
 - Economiquement: « Quasi-capital »
- Octroi
 - Lorsque le financement ne peut pas être obtenu par un autre moyen
 - Rating Moody's Baa3 (= Brésil)
 - N'est pas un outil d'assainissement
- Pas ou peu de garanties
- Amortissement à l'échéance
- Diverses formes de rémunération du prêteur - Objectif 15 à 25%
Internal rate of return (vs 25-50% pour des actionnaires)

2.2. PRÊT MEZZANINE (2)

- **Participation du prêteur à la gestion?**
 - En général, droit à l'information (identique à celle d'un membre du conseil d'administration)
 - En général, droit à être représenté par un administrateur de son choix
 - statut d'observateur
 - sans droit de vote
 - Rarement, droit à participer au processus décisionnel
 - Clause plus fréquente en cas de défaut

2.2. PRÊT MEZZANINE (3)

- Entrée au capital du prêteur ?
 - Parfois, equity kicker : conversion et option (1)



Source: von der Crone, Chenux, Hari et al.; www.adroit.uzh.ch, plate-forme en ligne de droit des sociétés; http://www.rechteck.uzh.ch/content.php?id=12224&kp=83&has_lect=1#12242 dernière visite le 07.02.2016

2.2. PRÊT MEZZANINE (4)

- **Entrée au capital du prêteur ?**
 - **Parfois, equity kicker : conversion et option (2)**

Emprunt convertible (convertible bond)	Emprunt à option (warrant)
Droit du créancier	Droit du créancier
Généralement incorporé dans un papier-valeur	Généralement incorporé dans un papier-valeur négociable indépendamment de l'obligation
Conversion de la créance en capital-actions (FE – FP) pendant un certain délai	Acquisition pendant un certain temps d'actions de l'emprunteur
En lieu et place du remboursement	Par le paiement d'un prix en espèces
A des conditions prédéterminées	A des conditions prédéterminées

2.2. PRÊT MEZZANINE (5)

- **Entrée au capital du prêteur ?**
 - **Parfois, equity kicker : conversion et option (3)**
 - Prérequis du point de vue de la société/emprunteur:
 - Décision d'augmentation conditionnelle du capital-actions
 - Suppression du droit de souscription préférentiel
 - Montant limité (ratio capital-actions vs capital cond.)
 - Majorité qualifiée
 - Acte authentique
 - Modification des statuts
 - Exécution

TABLE DES MATIÈRES (2)

1. Partie introductive

2. Quelques moyens de financement dans le détail

1. L'entrée au capital actions de fonds de Private Equity
2. Le prêt mezzanine convertible ou à option

3. Conclusion

3. CONCLUSION

- Quel est le but des fondateurs?
- Quel est le but des investisseurs?
- Les fondateurs doivent-ils / sont-ils susceptibles de perdre le contrôle?
- Est-ce possible de cohabiter? Pendant combien de temps?
- Et après?
- Modèles **S•E•C•A** (diapositives 27-32):
<http://www.seca.ch/Templates/Templates/VC-Model-Documentation.aspx>

MERCI DE VOTRE ATTENTION !

Prof. Olivier Hari

Avocat, docteur en droit

Chaire de droit des sociétés

Av. du 1^{er}-Mars 26

CH-2000 Neuchâtel

olivier.hari@unine.ch

www.droit-des-societes.ch



CLAUSE ÉLECTORALE

- **Representation of the Board and Initial Composition**
- The Board shall comprise a maximum of [number] Directors. Throughout the term of this Agreement:
 - [each of] the Investors shall have the right to be represented on the Board by [number] Director[s] nominated by [each of / the absolute majority of the voting rights represented by the Investors][, if and as long as the aggregate shareholdings of [such Investor / all Investors] reach or exceed [number] percent of the Company's then issued and outstanding share capital] (each an "**Investor Director**");
 - the Common Shareholders shall have the right to be represented on the Board by [number] Director[s] nominated by [the absolute majority of the voting rights represented by] the Common Shareholders[, if and as long as the aggregate shareholdings of all Common Shareholders reach or exceed [number] percent of the Company's then issued and outstanding share capital] (each a "**Common Shareholder Director**"); and
 - [the [Board / Shareholders collectively by [the majority] of voting rights represented by the Shareholders] shall from time to time nominate [number] independent Director[s] (each an "**Independent Director**").]
- **Election**
- The Directors shall be elected by the General Meeting of Shareholders in accordance with Section 5.1 for a one-year term. Each Shareholder hereby undertakes to the other Shareholders to cast its votes in the relevant General Meeting of Shareholders in favour of the person(s) nominated in accordance with Section 5.1.
- **Board Observer**
- Each Shareholder who is not represented on the Board by a Director shall have the right to appoint a person to attend all meetings of the Board as an observer ("**Board Observer**"). Each Board Observer shall: (i) be entitled to participate, without voting rights, in all Board meetings and (ii) be invited to Board meetings at the same time as Directors. Any information obtained by a Board Observer in his/her capacity as Board Observer shall be subject to the same restrictions as set forth in Section 6 and Section 16.2.



DROIT A L'INFORMATION

– INFORMATION RIGHTS

- During the term of this Agreement, the Company shall provide each Shareholder with, and each Shareholder shall have access to, the following information:
 - within 90 calendar days of the end of each financial year, audited financial statements prepared in accordance with the CO and Swiss GAAP;
 - within 30 calendar days of the end of each fiscal quarter, unaudited quarterly financial statements;
 - within [20] calendar days of the end of each month, monthly management accounts (i.e. balance sheet, profit and loss statement, cash flow statement);
 - no later than [60] calendar days prior to the end of each financial year, the proposed budget for the next following financial year; and
 - forthwith, any additional information reasonably requested by a Shareholder in order to (i) account for the investment made in the Company or (ii) meet the demands of any regulatory and/or governmental authorities, including, but not limited to, any information required in order to prepare a prospectus or filings to competition authorities.
- In addition, each Shareholder shall have the opportunity at its discretion to discuss any issues relating to its investment and the Company at least on a monthly basis with the Company, and the Company shall allow (i) consultation with the Senior Management on significant issues and (ii) access to the books, records and facilities of the Company at any time upon reasonable advance request to the Chairman. Notwithstanding anything to the contrary in this Agreement, an individual Shareholder shall not have the right to see compensation numbers of individual employees.



FIRST REFUSAL

– Grant of Right of First Refusal

- Each Additional Shareholder hereby grants:
 - in **first priority** to the Majority Shareholder;
 - in **second priority** to the other Shareholders (including the Majority Shareholder); and
 - in **third priority** to the Company (within the limitations of Art. 659 CO and Art. 680 CO) or to a third party designated by the Company;
- a right of first refusal with respect to the Shares held by such Shareholder in accordance with the terms and conditions set forth in this Section 11.3 ("**Right of First Refusal**").

– Pro Rata Allocation of Right of First Refusal

- In the event that the beneficiaries of the Right of First Refusal within a group of beneficiaries having the same order of priority pursuant to Section 11.3.1 exercise their Rights of First Refusal within the same (first or second) time period, in the aggregate, for more than the number of Relevant Shares, the Relevant Shares shall be allocated among such exercising beneficiaries pro rata to their then existing holdings of Shares.

– Drag-Along Right Takes Precedence over Right of First Refusal

- For the avoidance of doubt and notwithstanding anything to the contrary contained herein, Right of First Refusal shall not apply in case of a Drag-Along Event.



TAG-ALONG / DRAG-ALONG

– **Grant of Tag-Along Right**

- Each Shareholder hereby grants to the other Shareholders the right to co-sell a pro rata portion of the Shares held by such Shareholder together with the Selling Shareholder(s) to the proposed acquirer in accordance with the terms and conditions set forth in this Section 11.4 ("**Tag-Along Right**").

– **Grant of Drag-Along Right**

- The Shareholders hereby grant Shareholder 1 the right to require all other Shareholders to sell their Shares to a proposed acquirer in accordance with the terms of this Section 11.5.1 ("**Drag-Along Right**").



PURCHASE OPTION

- The Majority Shareholder (for the purposes of this Section, "**Option Party**") shall have an exclusive and irrevocable option ("**Purchase Option**") to purchase the Shares of a Shareholder (for purposes of this Section, "**Restricted Party**") if any of the following events ("**Triggering Event**") occurs:
 - the Restricted Party dies, becomes incapable to act or otherwise loses its capacity to exercise its rights and obligations under this Agreement;
 - the Restricted Party becomes subject to an Insolvency Event;
 - the Restricted Party commits a criminal act against the interests of a Party, of the Company or of any of its subsidiaries;
 - the Restricted Party materially breaches this Agreement, unless such breach and its effects are fully cured within 20 calendar days upon notification in writing of the breach and its effects by any other Party; a material breach shall include, without limitation:
 - any delay in the payment of Shares subscribed for or payments into the reserves or loans to be granted to the Company pursuant to any written agreement;
 - any transfer, pledge or other encumbrance of Shares in violation of this Agreement;
 - a breach of the non-competition undertaking set forth in Section 16.3.
 - the employment agreement between a Restricted Party and the Company is terminated before the fifth anniversary of the signing of this Agreement and the Restricted Party is considered a Bad Leaver;
 - the employment agreement between a Restricted Party and the Company is terminated before the fifth anniversary of the signing of this Agreement and the Restricted Party is considered a Good Leaver.



CONCORDANCE STATUTS / CONVENTION

- Unless expressly provided otherwise herein, the Articles, the Board Regulations and other governing documents of the Company shall, to the fullest extent permissible under applicable laws, include at all times any provisions required to give full effect to the terms and conditions of this Agreement, if and to the extent so requested by the Shareholders (acting jointly).
- In the event of any conflict or discrepancies between the provisions of this Agreement and the Articles, the Board Regulations or any other governing documents of the Company, the provisions of this Agreement shall prevail to the extent such conflicts or discrepancies pertain to matters between and among the Shareholders.

